Cement Masons Union Local No. 526 of the Operative Plasterers' and Cement Masons' International Association, AFL-CIO *and* P. J. Dick Contracting, Inc. Case 6-CB-5292

May 24, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 28, 1981, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in opposition to the General Counsel's exceptions and in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge that when P. J. Dick Contracting, Inc., hired Paul DiOrio on September 2, 1980, he was not employed as a supervisor within the meaning of Sec. 2(11) of the Act and, thus, the internal union discipline imposed upon him was not a violation of Sec. 8(b)(1)(B) of the Act. However, our finding is based on the conversations between representatives of Respondent and the Charging Party before DiOrio's hire, and on the credited testimony of Management Representative Haley that Respondent hired DiOrio as a journeyman with the intention of making him a supervisor when a supervisory opening occurred. We also rely on the Administrative Law Judge's finding that DiOrio's duties immediately after his hiring, including advising cement finishers when their work would be completed and calling the hiring hall when more workers were needed, did not rise to the level of the indicia of supervisory status set forth in Sec. 2(11) of the Act. Accordingly, we find it unnecessary to rely on the Administrative Law Judge's legal analysis of the terms and definitions contained in the collective-bargaining agreement between the parties.

DECISION

Statement of the Case

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held at Pittsburgh, Pennsylvania, on October 30, 1981, on complaint of the General Counsel against Cement Masons Union Local No. 526 of the Operative Plasterers' and Cement Masons' International Association, AFL-CIO, herein called the Respondent or the Union. The complaint issued on March 6, 1981, upon a charge filed on January 22, 1981, by P. J. Dick Contracting, Inc., here called the Charging Party or the Company. The issue presented is whether the Respondent unlawfully restrained and coerced the Charging Party in selection of representatives for purposes of collective bargaining, in violation of Section 8(b)(1)(B) of the Act. A brief was filed by the General Counsel.

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

P. J. Dick Contracting, Inc., a Pennsylvania corporation, has its principal office in Pittsburgh, Pennsylvania, and is engaged as a contractor in the building and construction industry. During the calendar year ending December 31, 1980, in the course of its operations it purchased and received products valued in excess of $50,000 directly from out-of-state sources. I find that the Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNION

I find that Cement Masons Union Local No. 526 of the Operative Plasterers' and Cement Masons' International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

Paul DiOrio is a cement finisher, long a member of Cement Masons Local 526, who for years has enjoyed the benefits of being referred to one job after another out of the Local's contractually established multiemployer hiring hall. In August 1980 P. J. Dick Contracting, here called Dick, a general construction company, wanted to hire him directly from another job where DiOrio was then working for another, unrelated employer, without bothering to have him first register at the hiring hall and waiting to be referred out in his regular turn. The Local 526 business agent told both him and Dick's high manager that they could not do that because it would violate the collective-bargaining agreement which supported the hiring hall, as well as the Union's rules and constitution. DiOrio and Dick were even advised that DiOrio, as a member of the Union, would be subject to disciplinary action within the Union if he bypassed the hiring hall and thereby took unfair advantage of his fellow members. The cement finisher and company did as they wished anyway, and on September 2, 1980, the finisher

simply moved from his old job to a new one, and Dick put him to work right away.

Twenty-two days later, on September 24, internal union charges were filed against DiOrio, saying he had violated a number of articles in the bylaws, etc., when he started working on a new job without clearing through the union hall. On October 20, he attended a regular hearing on his charge before the Union's executive board, and on January 20, 1981, was advised he had been fined $500 for the rules violation. He paid the fine.

The charge in this proceeding, and a later amendment, were filed by the Dick Company, and they state what is said to have been improper conduct by the Union in different ways. The complaint starts by saying that "On . . . September 2, 1980, Paul DiOrio accepted the position of concrete superintendent." It then adds that for having fined "a supervisor within the meaning of Section 2(11) of the Act," the Union coerced the employer in its selection of "representatives for the purpose of collective bargaining," and thereby violated Section 8(b)(1)(B) of the Act. Denying the commission of any unfair labor practice, Respondent rests essentially upon the assertion that when DiOrio came to work on September 2 he was not a supervisor at all, just an ordinary workman who was bound by the terms of the collective-bargaining agreement in effect and its ancillary hiring hall.

The entire case turns upon a very simple, purely factual question: When DiOrio was hired, and started to work, was he a supervisor within the meaning of the Act, or was he just a journeyman cement finisher like all the rest, covered by the contract, who can only be hired via the hiring hall? In the light of the pleadings, and all that was said at the hearing, some clarifications are in order at the outset.

1. If in fact at least during the month of September when he first came to work for this Company, DiOrio was not a statutory supervisor, the Union did nothing wrong in disciplining him as it did. The General Counsel concedes this. (I use the word *statutory* because, what with the apparent conflict between the contractual clauses pertaining to *foremen*, and the Taft-Hartley Act definition of the word *supervisor*, the parties to this proceeding are playing a word game and disregarding substance). The Company equivocated (see the testimony of Joseph Haley below), but even if it were to claim the right, under the clear contractual obligation shown here, to hire a plain journeyman outside the union hall, I would waste no time responding to that contention.

2. The Union admits that long after his initial hiring, as much as 3 or 4 months later, DiOrio did take on a supervisory job in the statutory sense, what the Company called a "superintendent" over its cement finishers working simultaneously at more than one of its construction projects. The Union also concedes that under the hiring hall written agreement, it has no right to demand that true, full supervisors must come in rotation out of its hiring hall registry. The determinative question, therefore, is whether during September, and possibly October—for that is when the Union took the disciplinary action now said to be unlawful—DiOrio was or was not a workman covered by the hiring hall agreements.

3. Much of the oral testimony by successive employee witnesses is blurred, both as to the time when things happened and as to just what it is that DiOrio did on this job or that, now or then. Some witnesses spoke of his duties and functions long after the month of October, but the question is only what were his responsibilities during September and October. The witnesses were vague, uncertain as to dates, and greatly generalized in their statements—saying that foremen "usually" do this or that, or that they did not watch DiOrio the full 8 hours each day, or that the "system" was such and such. With DiOrio himself, the first witness, admitting he did very little out of the ordinary as a cement finisher at the start, this blurred testimony serves little to support the affirmative burden resting upon the General Counsel to prove DiOrio was in reality an absolute supervisor from the start.

4. But the greatest confusion of all flows from the reality that the hiring hall contract in this case expressly provides that "foremen" must come from the rotating hiring hall, and may not be hired at will by any employer directly from some other job he may be on at any given moment. The contract says the first cement finisher hired on any job must be "classified as a working foreman," and must be paid 50 cents per hour more than the others. It also says that when three or more finishers are on any one job "a foreman shall be placed in charge of the work," and that when there are nine or more men, the foreman shall be paid $1 per hour more than the regular men. In the case at bar the General Counsel did not question the legality of a contract which demands that a foreman "in charge of the work" must be a union man! In fact, the other parties, each in his own way, stretched the significance of these provisions in alternate directions. When the executive director of the Master Builders Association, Haley, speaking on behalf of the contractors, agreed his association "wanted the right to allow people to quit one job and go to another," he was saying that not even plain journeymen should have to come from the hiring hall. And the Union, in its answer to the complaint, says—as a separate affirmative defense—that even if DiOrio was in truth a supervisor within the meaning of Section 2(11) of the Act, the Dick Company still had to clear from the Union's hall before putting him on any job! These extreme concepts apart, it remains a fact that even if it is shown DiOrio, in September or October, was "in charge of the work," he was still subject to the hiring hall strictures.

In such a state of affairs, repeated testimony that DiOrio told the men what work to do, that he moved them from one place to another, that he told one or another he would not be needed this afternoon or tomorrow, that he called the hall because two more men would be needed tomorrow, that he called for more material when what had arrived was not enough, proves only that he was a foreman—"in charge"—as the contract says. To paraphrase these "in charge" duties, as did the General Counsel's witnesses, as laying people off, or hiring people, or responsibly assigning work, does not strengthen the critical assertion that DiOrio was a "superintendent" during September or October. Section

2(11) of the Act does say a supervisor is identified by the responsibility to transfer, layoff, assign, or responsibly direct, but in this case all parties are bound to agree—as per their signed contract—that such duties do not suffice to prove DiOrio a supervisor at all. If they argued otherwise they would be branding the contract illegal on its face.

What all this means is that the real question here is not whether DiOrio, in September and October, worked only with his hands 8 hours a day, using tools of the trade, but whether, in addition to discharging all the duties of a foreman "in charge of the work," and being paid extra for that nonstatutory function, he exercised still greater power in actual charge of all of the cement finishers used simultaneously by the Dick Company at many, separate construction sites. And I think the record, all things considered, fails to prove he in fact was, before the disciplinary charges were brought, what Volpatt called a "concrete superintendent."

At the start of the hearing, Volpatt, vice president of Dick Company, testified he knew DiOrio very well from a prior association, and wanted him as a "superintendent" right away, that his purpose in taking him on was to use him as such from the start. He said he phoned Augustine Rossi, business agent of Local 526, to seek approval of avoiding the hiring hall. While denying having said he intended to use DiOrio as a supervisor at a later date, Volpatt did not testify that he told Rossi he wished to start DiOrio as an immediate superintendent. Right there, his total story becomes suspect. Rossi's version of these prehire talks is the same; that all Volpatt asked was leave to hire a man directly from another job, with no mention at all about supervisory status. As to DiOrio, what he emphasized to Rossi was that this would be "a better job" for him, although at one point he did testify "I believe I did tell him I was supposed to be in charge of all the men . . . ." In the light of what will be explained below, I do not credit DiOrio as to this.

Coming to what work he did, DiOrio's testimony jumps back and forth from his first 2 months to 1981, a period that is not in dispute now. He did say that during his first 2 months he worked, "I was mostly working all day"; "There were days that I worked 8 hours." "Q. And if there would be any question that would come up on the job, what you would do as the foreman on the job is go to the superintendent and find out what the answer would be and come back and bring it to the men, isn't that what you did? I'm talking about the very beginning. A. Yeah. Q. Isn't that what you did? A. Yes I did, to be honest, I don't really recall."

When a cement finisher complained about having been underpaid, DiOrio sent him to the general construction superintendent of the Dick Company who supervises all crafts for resolution of all problems. On another occasion, during that early period, a man hurt his hand on the job, and DiOrio sent him to the general superintendent, who then authorized the man to go to the hospital. DiOrio's testimony that the reason he did not himself decide what to do about that problem was because he was too busy to drive the finisher to the hospital will not do; after getting permission to leave from the real superintendent, the finisher drove himself to the hospital. DiOrio spoke of "hiring" and "firing" people, language that fits well into the definition of a supervisor. But what he was really saying is that it was his duty to advise finishers when their work would be finished so they could quickly get their names on the hiring hall list, and then calling the hall when more men would be needed. This is the work of every foreman covered by this contract.

But there is really no need to belabor the detailed testimony of one employee after another, for the most part relating to much later events. A grievance was filed by the Union over this business of the Company hiring a man without going through the hall. It reached the second stage of arbitration on October 1, where three representatives of management and three union agents heard the disputed story from both sides. Rossi, the business agent, testified that Volpatt said there "that he wanted to hire brother Paul DiOrio and, somewhere, at some time period, he wanted him to be his superintendent. P. J. Dick Company is the general contractor of the postal facilities that they're building over on the North Side, which is a gigantic job. From that conversation at the hearing, I then understood that the reason he was hiring Paul DiOrio was, that when that job broke and he needed a supervisor on that particular job, he wanted Paul DiOrio to run that job." As a witness now Volpatt denied ever having said his intent in September was to use DiOrio as a superintendent at a future date. The arbitration panel was deadlocked, three against three. Haley, then present for the employers, also testified about that session. Despite occasional evasion, more than once he proved that the Company's position was—on October 1—that it had a right to bypass the hall for the reason that it wanted DiOrio to be its superintendent for later, bigger jobs, it intended to take on. From Haley's testimony: "Q. Now, recall this if you would, under what conditions did Mr. Volpatt say he wanted to hire this man? . . . A. We—I had, and my Committee's sense of meaning was that Mr. Volpatt was hiring this man as a supervisor, that's why they took the position initially. It was later explained that there was a possibility that this man would work with his tools until the supervisory job opened up. Our Committee still maintained that the man had the right to leave one Employer and go with another. "Q. At the time of the Arbitration they hadn't yet found time when he would be a supervisor and he would work as a journeyman. Is that . . . A. That's to the best of my recollection, yes." "Q. And their [the union agent's] purpose in being there was to complain about a man quitting his job as a journeyman for one company and going to work as a journeyman for another company? A. That is correct. Q. Okay. And the Company responded by saying, well, at some point in time, we don't know when, we're going to make him a supervisor? A. That's is correct. Q. my question is; on October 1 of 1980, the company was still telling you that it was some time in the future that he might become a supervisor? A. That's the best of my recollection."

But there is no need to evaluate the oral testimony as to the Company's position and demand at that time. Haley wrote up his usual contemporaneous minutes of the meeting, and they were received in evidence. He

took pains to say "I tried to be as accurate as I can . . . ." The minutes report the words spoken by both Rossi and Volpatt. They show Rossi demanded the right to insist that regular employees go only out of the union hall, and may not switch jobs at will. The minutes also quote Rossi as admitting "the union does not have control over hiring of Cement Masons for supervisory positions." The minutes then go on to report what Volpatt said, and he is quoted as follows: "The hiring of this man by P. J. Dick Contracting, Inc. was intended for him to be a supervisor, when a supervisory job opening occurred. Until that time, the man would be working with his tools as a journeyman."

There is no need for further comment. This was the representative of management, clearly on the side of the Dick Company, the Charging Party here, testifying, honestly, to his best recollection and proving the truth of his statement in writing.

I find, on the record in its totality, that when the Dick Company hired DiOrio on September 2, 1980, it intended to, and in fact for a considerable period of time did use him as a pure cement finisher, or at best as one of those foremen who are covered by the hiring hall obligation anyway. The Union had a perfect right to discipline the man for violating the contractual understanding, and presuming to take advantage of his fellow members. This is the essence of what internal union discipline, lawful under the statute, means. And the fact that, months later, DiOrio really became a supervisor within the meaning of Section 2(11), is totally immaterial to this case.

ORDER[1]

I hereby recommend that the complaint be, and it hereby is, dismissed.

[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.